UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cal Cartage Transportation Express, LLC, Respondent, and International Brotherhood of Teamsters, Charging Party.	CASE NO. 21-CA-247884 **Charging Party's Opposition to Respondent's Motion for Summary Judgment**

I. INTRODUCTION

Respondent Cal Cartage Transportation Express, LLC ("Employer") has moved for summary judgment, arguing that this matter is *de minimis* because it entered into individual settlements of state-law wage claims with the 14 driver employees against whom it had previously discriminated and retaliated for their union and protected concerted activity. As the Employer acknowledges, however, the charge here was filed by the International Brotherhood of Teamsters ("Union"), not the individual drivers, because the Employer's discrimination and retaliation arose in response to the Union's organizing campaign among the Employer's driver employees (who are misclassified as independent contractors). In any event, the General Counsel was not involved in those individual settlements. The Employer does not actually argue that the drivers' individual wage claim settlements waived the Union's unfair labor practice allegations here, as of course it cannot; instead, it argues that under Board law, the matter is *de minimis* and

should be dismissed because its discrimination had no economic impact, and the 14 driver employees no longer work for the Employer.

The Board should not dismiss this case, certainly not on a motion for summary judgment. The *de minimis* doctrine, which saw scattered use from 1973 to 1976 and has largely disappeared since then, is of questionable legality and is particularly inapplicable in light of contemporary casehandling practices. Moreover, even were the doctrine to continue to have full force today, it is inapplicable to this case, in which the violations were not isolated and minor, and where the Employer has taken no steps to substantially remedy them.

II. BACKGROUND

The Union filed the charge in this matter on September 9, 2019. On December 10, 2020, Region 21 issued a complaint alleging that the Employer, a transloading and distribution company, retaliated against 14 of its employees who engaged in union and protected concerted activity. Specifically, those employees, with the Union's assistance and in order to further a Union organizing campaign, filed wage claims at the California Department of Labor Standards Enforcement ("DLSE"), alleging that they had been misclassified by the Employer and were employees, not independent contractors. In December 2018, the DLSE found that they were employees and awarded backpay and penalties. Thereafter, the Employer appealed the 14 cases to Superior Court. Then, in July 2019, in the midst of a Union organizing drive, the Employer ceased allowing those 14 employees to sign six-month contracts to work for the Employer and instead forced

them into month-to-month contracts. It is this action that the Union and General Counsel allege was in retaliation for the employees' union and protected concerted activity.

In February 2020, each of the 14 drivers settled their individual wage claims with the Employer and severed their employment relationship. The employees were each represented in these contingency fee cases before the California Superior Court by Cornelia Dai of the law firm Hadsell Stormer Renick & Dai and Julie Gutman Dickinson of the law firm Bush Gottlieb. The Union was not a party to any of these 14 cases and had no say in the litigation or the settlement. The Hadsell Stormer firm has not represented the Union in any matter, and does not represent any of these 14 driver employees in any other matter. The Bush Gottlieb firm does separately represent the Union in the instant unfair labor practice charge upon which the General Counsel has issued complaint, but there are no other parties to the instant case. (*See* Declaration of Julie Gutman Dickinson ¶ 3.)

On January 8, 2021, the Employer moved for summary judgment, asking the Board to dismiss the Complaint as *de minimis*. The General Counsel has opposed.

III. ARGUMENT

The Board should deny the Employer's motion. The *de minimis* doctrine is a relic of the overloaded Board docket of the 1970s and has no value in today's environment, particularly considering its questionable legality in the first place—if the Board finds a violation, it is obligated by the National Labor Relations Act to remedy that violation. Moreover, even if the Board were to find the *de minimis* doctrine might apply in some cases today, it is inapplicable to this case, particularly at the summary judgment stage.

A. The De Minimis "Doctrine" Is, for Good Reason, a Dead Letter

The Union understands there to be all of nine cases in which the Board has dismissed a complaint because it alleged only a *de minimis* violation, seven of which occurred in the period from 1973 to 1976, and the last of which occurred in 1985.[1] Member Penello attempted to keep the concept alive after 1976, writing in a variety of dissents and concurrences that he would dismiss a complaint as *de minimis*, but never drawing support for that assertion. And while the Employer points out that a handful of Board members have referred to the doctrine over the years since, others have cast doubt on the viability of the doctrine: Chairman Fanning and Member Jenkins did so as the majority in *Postal Service*, 242 NLRB 228, 228 n.1 (1979), *Regency at the Rodeway Inn*, 255 NLRB 961, 962 n.5 (1981), and *Holladay Park Hospital*, 262 NLRB 278, 279 n.2 (1982); Members Jenkins and Truesdale, again as the majority, questioned the doctrine in *Coca-Cola Bottling*, 250 NLRB 1341, 1343 n.13 (1980); and Member Liebman noted her reluctance to ever find an allegation *de minimis*, concurring in the finding of a violation in *Sheet Metal Workers Local 7*, 345 NLRB 1322, 1327 (2005).

The Employer admits that the doctrine has "fallen into disuse" but fails to mention that there are good reasons for this: To the extent dismissals for *de minimis* conduct were

[1] *See Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973); *Postal Serv.*, 205 NLRB 624 (1973); *Wichita Eagle & Beacon*, 206 NLRB 55 (1973); *Murray Ohio Mfg.*, 207 NLRB 481 (1973); *Detroit Plastic Molding*, 209 NLRB 763 (1974); *Metalloy Foundry*, 223 NLRB 416 (1976); *Bellinger Shipyards*, 227 NLRB 620 (1976); *Am. Steel Bldg.*, 270 NLRB 11 (1984); *Titanium Metals*, 274 NLRB 706 (1985).

ever a legitimate act by the agency charged with enforcement of the Act, the animating principles behind such dismissals have little force now.

1. "De Minimis" Dismissals Were Limited to the Particular Context of the Board in the 1970s

Administrative Law Judge Robert A. Giannasi recently issued an excellent and well-researched decision regarding the *de minimis* rule. *See Casino Pauma*, JD-08-20, Case No. 21-CA-161832 (Mar. 3, 2020). The judge candidly notes that the *Jimmy Wakely* case that inaugurated the *de minimis* concept "is remarkable only in its insignificance." *Id.* at 7. More to the point, the judge elucidated two wholly correct criticisms of the case and its continuing vitality in the modern era.

First, "[t]he underpinnings of *Jimmy Wakely* are shaky [because] there is much authority that, once a violation is found, the Board may not withhold issuance of a remedial order." *Id.* at 8. The *most* relevant authority for that position, as the judge notes, is the usage in Section 10(c) of the Act of the mandatory "shall" regarding Board remedies.[2] The courts have affirmed that Section 10(c) creates a duty on the Board not to ignore violations. *See, e.g.*, *Woodworkers v. NLRB*, 380 F.2d 628, 630–31 (D.C. Cir. 1967) ("We think the[] words [of Section 10(c)] mean what they say, and that that

[2] "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board *shall* state its findings of fact and *shall* issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . . ." § 10(c) (emphasis added).

meaning, in terms of Congressional purpose, is unmistakable."). The Board's language in the *de minimis* cases has sometimes tended toward the problematic in this regard. For instance, in *Square D*, 204 NLRB 154 (1973), the Board found no violation, but in the alternative, found that any "technical contravention of the Act" did not "justify either the finding of an unfair labor practice or the issuance of a remedial order." *Id.* at 154. It was this alternative holding for which the Board cited *Jimmy Wakely*. Even worse is *Bellinger Shipyards*, 227 NLRB 620 (1976), in which the majority found it "true that at a point in time which preceded the issuance of the complaint the Respondent did in fact maintain an *unlawful* no-solicitation rule," yet also found that "the entire situation is one of little significance and there is no real need for a Board remedy." *Id.* at 620 (emphasis added). Member Fanning correctly dissented that the majority's failure to issue a remedy "effectively condone[d] the violations . . . ." *Id.* at 621.

Judge Giannasi's second point in *Casino Pauma* was that the workload considerations of the Board are drastically different now than they were in 1973:

> In FY 1973, when *Jimmy Wakely* was decided, the Board issued 1463 decisions in contested cases; in FY 2019, the Board issued 303 decisions in contested cases. This is a decrease of 80%. Indeed, it is very unlikely that, in today's world, the *Jimmy Wakely* case would have reached even the trial level, much less the appellate level of the Board. Today, the General Counsel is more inclined institutionally to use prosecutorial discretion to screen out such cases or settle them before complaint issues. But, even at the trial level, administrative law judges today are more active in securing settlements. In the early 1970s, one-third (33%) of ALJ dispositions were by settlement rather than by decision; in 2019, about 75% of ALJ dispositions were by settlement. The decades-long emphasis on settlements across all levels of the Board since its issuance in 1973 has made *Jimmy Wakely* only a ghostly presence today in the annals of the Board.

Casino Pauma at 8. This statistical point relates to a broader idea, one that Judge Giannasi also refers to: *Jimmy Wakely* and its limited progeny are best read as a criticism of the General Counsel's office's exercise of its prosecutorial discretion in the mid-1970s, rather than as a genuine and ongoing ground on which to dismiss complaints of actual violations of the Act. Particularly notable in this regard is the Board's lengthy blockquote in *Jimmy Wakely* of a New York City Bar committee report focused on the General Counsel's authority, ending with the recommendation that "Regional Directors be . . . instructed" that where violations are "isolated or of trivial consequence," complaints need not be issued. *Jimmy Wakely*, 202 NLRB at 621. To similar effect is the Board majority's comments in *Wichita Eagle & Beacon* that the case represented "straining at gnats," and that it "should not have been processed" and was "an unnecessary and unwise investment of agency resources . . . ." 206 NLRB at 56 & n.3. *But see id.* at 56 (Fanning, dissenting) ("[T]he majority, fearful of gnats, has swallowed a camel."). Chairman Miller's dissent in *Gray Line*, 209 NLRB 88 (1974), commenting that "[t]he complaint . . . should never have issued," shows the same concern. *Id.* at 88.[3] The concurring comments of Member Penello, the foremost advocate for the *de minimis* doctrine, in *Peerless Food Products*, 236 NLRB 161 (1978), are also instructive:

> I regret that, in the face of the dramatic increase in caseload projected to 61,000 cases in the next fiscal year and the backlog of cases awaiting hearing amounting to crisis proportions, this Agency would burden its limited resources and limit its capability to promptly and effectively provide remedies by concerning itself with issues involving such trivia. . . .

[3] Chairman Miller's dissent also illustrates the prior point regarding Section 10(c) because he also advocates for dismissing the complaint notwithstanding that "[p]erhaps a technical violation of our Act has been established." *Gray Line*, 209 NLRB at 88.

> *[T]he General Counsel should exercise his discretion under Section 3(d) of the Act to refuse to process violations of minor or isolated character.*

Id. at 162 (emphasis added). In short, absent a concern that the General Counsel's office in modern times is issuing too many complaints and/or failing to settle too many cases—and as Judge Giannasi notes, the General Counsel can no longer be considered to "strain[] at gnats" in this way—there is no need for renewed application of the *de minimis* doctrine.

2. The First Prong of the "De Minimis" Standard Is a Watered-Down Repudiation

The *Jimmy Wakely* Board described two reasons it was finding the case *de minimis*, and the Employer's motion glosses over the second prong of the test entirely: "[1] the conduct involved was . . . minimal *and* [2] has been . . . substantially remedied by the Respondent's subsequent conduct . . . ." 202 NLRB at 620 (emphasis added).[4] The Board and individual members have relied on the second prong repeatedly, both in finding cases *de minimis* and in finding and remedying violations.[5] Yet the Board already

[4] As described below, the Employer here has taken no steps whatsoever to remedy the violations.

[5] *Compare Truck Drivers Local 705*, 205 NLRB 387 (1973) (Penello, dissenting) (union expressly withdrew threat to picket); *Postal Serv.*, 205 NLRB 624 (manager's violation was premised on his reading of certain CBA language, and he stopped relying on that language); *Wichita Eagle & Beacon*, 206 NLRB 55 (supervisor who filed decertification petition withdrew it after 10 days); *Detroit Plastic Molding*, 209 NLRB 763 (handbook rules rescinded); *Retail Clerks*, 226 NLRB 1393 (1976) (Penello, concurring) (supervisor met with threatened employees with union representative and hashed out the issue); *Bellinger Shipyards*, 227 NLRB 620 (rule rescinded before complaint issued); *Teamsters Local 85*, 328 NLRB 72 (1999) (Hurtgen, concurring) (union had already disclaimed interest) *with Peyton Lincoln-Mercury*, 208 NLRB 596 (1974) (comments about better benefits for leaving the union were never rescinded); *N. Elec.*, 225 NLRB 1114 (1976)

has a way for wrongdoers to avoid prosecution and the issuance of a remedial orders: repudiation. *See, e.g.*, *Passavant Mem'l Area Hosp.*, 237 NLRB 138 (1978). Repudiation must, among other requirements, be "unambiguous" and adequately published, and it must assure "employees that in the future their employer will not interfere with the exercise of their Section 7 rights." *Id.* at 138–39 (quoting *Douglas Div.*, 228 NLRB 1016 (1977) & citing *Fashion Fair*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965)). To the extent the *de minimis* concept permits someone who has violated the law to "substantially remedy" their violation by conduct that falls short of full repudiation, it is unclear why the Board would permit lawbreakers to escape accountability for their actions by engaging in this watered-down repudiation. On the other hand, if the *Jimmy Wakely* notion of substantial remedy requires the same conduct as for a repudiation, then of course there is no need for a separate doctrine. Either way, then, the second prong of *Jimmy Wakely* shows why the *de minimis* concept should be abolished or ignored: It either undermines or duplicates the well-established and important repudiation defense.

(handbook rule not amended until after complaint issued, and after had been in effect during union election); *Coca-Cola Bottling*, 250 NLRB 1341 (threats not remedied); *Print-Quic*, 262 NLRB 857 (1982) (threat neither disavowed nor remedied); *St. Vincent's Hosp.*, 265 NLRB 38 (1982) (rule maintained for two years and conduct not repudiated); *Hollaender Mfg.*, 299 NLRB 466 (1990) (employer made no remediation of violations); *Nabors Alaska Drilling*, 325 NLRB 574 (1998) (unlawful statement not "rendered meaningless" by later conduct); *Golub Corp.*, 338 NLRB 515 (2002) (threat of suspension not effectively contradicted by later conduct); *New England Confectionary*, 356 NLRB 432 (2010) (promise of benefit not repudiated or otherwise remedied).

B. This Case, Particularly in this Posture, Is a Poor Vehicle to Revive the De Minimis "Doctrine"

In light of the weaknesses of the *de minimis* concept described above, even if the Board does not actually overrule or expressly abandon *Jimmy Wakely*, it should be very careful only to apply it in a case, and at a time, that very clearly calls for its use. This is not such a case, and summary judgment is not such a time.

1. Whether the Violation Here Is *De Minimis* Cannot Be Determined on Summary Judgment

In eight of the nine cases in which the Board has applied the *de minimis* concept to dismiss a complaint, it did so after full litigation. Only in *Detroit Plastic Molding*, 209 NLRB 763, did the Board rule on summary judgment.[6] In that case, the *General Counsel* moved for summary judgment because the Employer had admitted the material facts in its answer, and the Employer cross-moved in response to the Board's notice to show cause. *Id.* at 763. In other words, the Board has never granted a motion for summary judgment on *de minimis* grounds in this posture, where only one party seeks summary judgment and substantial and serious disputed facts remain.

Moreover, *Detroit Plastic Molding* concerned two handbook rules alleged to be facially unlawful, but which were in effect for only a short time, apparently due to inadvertence, and which were never enforced. Here, by contrast, the allegation is that the

[6] The Employer cites this case with a "see, e.g." signal, misleadingly implying that the Board has made *de minimis* findings in other summary judgment cases as well. That does not appear to be the case.

Employer retaliated against Union-supporting employees for their union and protected concerted activity by changing their terms and conditions of employment in the context of a Union organizing drive. The only fact the Employer proffers in support of a finding that the matter should be deemed *de minimis* is that the 14 employees in question have left the employ of the Employer pursuant to settlement agreements. The Board has *no* facts about the chilling effect of the violations on the rest of the Employer's workforce or the role the violations played in the Employer's campaign against the Union, crucial questions in the *de minimis* cases. *See Square D,* 204 NLRB 154 (isolated comment made to a single employee); *Murray Ohio Mfg.*, 207 NLRB 481 (tearing up of union card occurred in front of only one employee); *Mayfield's Dairy Farms*, 225 NLRB 1017 (1976) (seven interrogations not *de minimis* as they were part of the employer's antiunion campaign); *Kansas City Power & Light*, 231 NLRB 204, 206 (1977) (single threat not isolated enough to be *de minimis* because arose from employer's union animus and dismissal would invite repetition); *Brooks Cameras*, 250 NLRB 820 (1980) (while interrogation was only directed at one employee, it concerned the entire unit).

Indeed, the facts will show that the violations of employees' Section 7 rights sent the message loud and clear to the rest of the workforce that workers will be retaliated against if they engage in union or protected concerted activity by bringing wage claims challenging their misclassification. Presently, with no Board remedy having issued, the remaining misclassified drivers employed by the Employer know only that 14 of their coworkers who demonstrated support for the Union and who concertedly filed wage claims against the Employer were penalized by being given short-term contracts, and

currently no longer work for the Employer. Thus the Board must ameliorate the public harm caused by the Employer's unlawful conduct through a public notice posting and mailing. Even if there were a proper role for the *de minimis* doctrine in this—or any—case, summary judgment would not be the appropriate time to make the determination.[7]

2. The Conduct Here Was Not Minimal

The first prong of the *Jimmy Wakely* doctrine is that the violation is "minimal." Here, the allegation is that the Employer changed a substantial term of the employees' employment (the length of employment guarantee they were given) from six months to just one month in retaliation for union and protected concerted activity. The *de minimis* cases are all in the vein of threats and other kinds of statements that violate the Act, and a key factor is often that a threat was not followed through on. In no cases of which the Union is aware has the Board found an *actual* change to terms and conditions to be sufficiently minimal to justify dismissal. The type of violation in the nine *de minimis* dismissals were as follows:

- Threat, no action taken (*Jimmy Wakely*, 202 NLRB 620; *Kansas City Power & Light*, 231 NLRB 204; *Titanium Metals*, 274 NLRB 706)
- Grievance unilaterally placed on hold, then reinstated (*Postal Serv.*, 205 NLRB 624)

[7] The Employer points out that dismissing a case as *de minimis* after full litigation has occurred robs the dismissal of its practical value. In fact, this is yet another reason the *de minimis* concept should not exist in the first place—it occasions little to no savings of Board resources. This mystifying pointlessness is, additionally, further evidence that what the *Jimmy Wakely* cases really represent is the Board's expression of frustration with the General Counsel's practices of the time, which practices have changed substantially in the decades since.

- Decertification filed and withdrawn (*Wichita Eagle & Beacon*, 206 NLRB 55)
- Tore up union membership card (*Murray Ohio Mfg.*, 207 NLRB 481)
- Unenforced rules (*Detroit Plastic Molding*, 209 NLRB 763; *Metalloy Foundry*, 223 NLRB 416; *Bellinger Shipyards*, 227 NLRB 620)
- Interrogation (*Am. Steel Bldg.*, 270 NLRB 11)

Clearly, this is not the type of case the Board should find contains a *de minimis* violation.

3. The Employer Has Not, and Does Not Claim to Have, "Substantially Remedied" Its Conduct

As noted above, the second prong of *Jimmy Wakely* is that the respondent has "substantially remedied" the violation. The Employer quotes the standard in its motion but thereafter completely fails to mention this requirement. This is no surprise because the Employer has taken no actions, and does not contend to have taken any actions, that could be considered to have "substantially remedied" anything. It has not told the 14 employees, much less the rest of its employees, that it will not change their terms and conditions of employment if they choose to file wage claims, or if they attempt to form or otherwise support a union.

The Employer's motion and declaration assert an innocent explanation for the change of conditions of the 14 employees, but that explanation is pretext and, in any case, a matter for the Administrative Law Judge and the Board to weigh against the General Counsel's evidence that the real explanation was the employees' union and protected concerted activity. In other words, the Employer's attempt to obtain dismissal on *de*

minimis grounds is really an attack on the core merits of the case, and the Board should address the merits after trial, not on the Employer's abbreviated motion.

Furthermore, it is clear that it must be *action by the Respondent* that substantially remedies the conduct in order for a case to be dismissed as *de minimis,* not simply changed circumstances. For instance, the Board has specifically found that an affected employee having left employment does not render a violation against that employee *de minimis*. *See Regency at the Rodeway Inn*, 255 NLRB 961. Further, in *Donald R. Bogard*, 300 NLRB 841 (1990), the Board found the fact that the union overwhelmingly won its election and achieved a collective-bargaining agreement did not render the employer's campaign violation of a promise of benefits *de minimis*.[8] Therefore, the fact that the 14 driver employees are no longer employed is irrelevant. The violation occurred while they *were* employed, and the Employer has taken no steps whatsoever to remedy the violation, so the case cannot be dismissed as *de minimis*.

Moreover, by issuance of the Complaint in this matter, General Counsel Robb asked the Board to exercise its authority for not only the 14 discriminatees, but for the public interest in vindicating the rights of the remaining workforce, made up mostly of similarly situated misclassified drivers, to ensure the Employer does not continue to violate employees' rights.

[8] It is worth noting that, here, the Union has *not* become the representative of the Employer's employees despite the organizing campaign in which the violations arose.

4. The Employee Status of the Discriminatees and the Right of Employees to Assert that Status Have Ongoing Importance to the Employer's Employees

The Employer complains that litigation of employee status in addition to the substance of the violations will be a significant undertaking in light of the remedy.

First, it is strange to see the Employer denigrating the Board's notice-posting remedy. In light of its failure to truly address the prongs of the *de minimis* test or engage with the way *Jimmy Wakely* has been applied (and not applied) by the Board, what its motion amounts to is an argument that any case in which the remedy is solely a notice posting is *de minimis* and should be dismissed. The Employer plainly proves too much—the General Counsel routinely litigates, and the Board routinely issues orders in, cases that involve "only" a notice posting. Moreover, the notice is not just a piece of paper, but is rather the public portion of an actual order, enforceable by the federal courts, to cease violating the Act. The Board dismissing this case because the 14 individual employees will not see any money or any restored conditions of employment would be an abdication of its authority and duty to enforce the Act, even where that enforcement simply amounts to telling lawbreakers that they must abide by the law. (A finding of violation and remedial order have practical effects as well, as recidivists are—appropriately—treated differently by the Board than one-time actors, and prior violations can be relevant evidence of animus in future proceedings should the occasion arise.)

Second, the Employer insinuates that employee status is simply a procedural hurdle the parties will have to deal with in litigating this case. In fact, employee status is

central to the case and its context, and a finding of employee status has meaning for the drivers who remain employed by the Employer. As noted above, the employees here were misclassified as independent contractors. They filed wage claims (and won) because that misclassification had ramifications for their pay and benefits, and establishing employee status is obviously an important part of a union organizing campaign in a workplace where the employer asserts that the employees are independent contractors. Therefore it will be important for the Employer's remaining employees, most of whom are driver employees similarly situated to and misclassified like the 14 discriminatees, to learn via a notice posting that they, like the drivers who engaged in union activity and filed wage claims challenging their misclassification, are in fact employees under the Act and thus have all rights accorded under the law, including the right to engage in union and other protected concerted activity, and most particularly the right to form a recognized union and bargain with their Employer.

In short, employee status is not a headache to be litigated in order to get to the meat of the case; it *is* the meat, so the prospect of such litigation does not add weight to the Employer's argument for dismissal of this case as *de minimis*.

5. The Employees Cannot, and Did Not, Waive or Release the Allegations in the General Counsel's Complaint

The Employer points out that the 14 discriminatees in this case "[a]ll executed general releases, which included a release of any claims they may have had under the NLRA" and then claims "[t]he settlement with all 14 drivers should have ended the entire controversy" while acknowledging that the Union is the charging party in this case, not

the individuals. (Mot. at 3.) The Employer does not explain why the individual driver settlements "should have" resulted in the withdrawal of this case; it seems clear that what the Employer means is that it does not want to deal with the matter of the instant unfair labor practices anymore. If that is so, it had and has a variety of options: it could have not discriminated against the employees in the first place; it could settle with the General Counsel; it could attempt non-Board settlement with the Union; or it could withdraw its Answer and accept a default judgment.[9]

In any event, it is clear that the individual driver settlements regarding wage claims have no legal effect on this unfair labor practice case filed by the Union. The individuals did not and could not waive the Union's right to pursue the charge, much less the General Counsel's right and duty to do the same. And while Bush Gottlieb, and in particular Julie Gutman Dickinson, represented both the 14 employees in their individual wage claim cases against the Employer, and the Union in this unfair labor practice case, the Employer does not—and could not—claim it believed it was entering into a settlement with the Union. (*See* Declaration of Julie Gutman Dickinson at ¶ 4.)

Rather, the gravamen of the Employer's argument is that the Board should dismiss because the Employer reached individual settlement agreements regarding wage claims with the same 14 individuals who were retaliated against because of their union and protected concerted activity. The implications of giving that kind of argument any credence would be far-reaching: if employers and unions could render Board proceedings

[9] In light of the Employer's denigration of the notice posting, this latter option seems reasonable. If the posting is of so little importance, then why not just do it?

de minimis simply by obtaining *individual* waivers of claims, what is to stop those respondents from avoiding any number of findings of violations of the Act by entering agreements with employees without the knowledge, much less participation, of charging parties? Finding that the individual driver employees here *in effect* waived the collective rights of their coworkers—which is what a dismissal would do—creates an end-run around the Act. The employees here were represented by counsel, but in most disputes that will not be the case. Lawbreakers escaping accountability for their actions in violation of the Act is not what the Board had in mind in *Jimmy Wakely*. The *de minimis* concept is wholly inapplicable to this case, and the Employer's motion should be denied.

IV. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board deny the Employer's motion for summary judgment. Even if any case is suitable for treatment as *de minimis*—and the Union asserts that no case is—this case is not *de minimis* and should proceed to the scheduled hearing.

Dated this 17th day of February, 2021.

By: *s/ Jason Wojciechowski*

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DECLARATION OF JULIE GUTMAN DICKINSON

I, Julie Gutman Dickinson, declare as follows:

1. I am an attorney and partner with Bush Gottlieb, ALC, attorneys of record for the International Brotherhood of Teamsters ("Union") in this matter. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Along with Cornelia Dai of the law firm Hadsell Stormer Renick & Dai LLP, I represented, on a contingency basis, each of the 14 driver employees of Cal Cartage Transportation Express LLC ("Employer") who are the alleged discriminatees in this case, in the Employer's appeal/trial de novo in California Superior Court following the DLSE's decision finding in favor of each of the 14 drivers on their wage claims. As part of my representation of each of these 14 drivers in the wage claim litigation, I, along with Dai, engaged in settlement conversations on behalf of each of the 14 employees with counsel for the Employer, including Stephen L. Berry of the law firm Paul Hastings.

3. At no time during those settlement conversations, including during the mediation that ultimately led to final settlements between each of the 14 employees and the Employer, did I state anything that would reasonably tend to give the impression that I was also representing the Union in those individual settlements, or that the Union was amenable to resolving this unfair labor practice proceeding through the individual settlements. Indeed, the Union was not a party to any of these 14 wage claim cases, did not pay any attorneys' fees in any of these cases, had no say in the litigation or the

settlement of these cases, and did not see, much less sign, any of the individual settlement agreements. The Hadsell Stormer firm has not represented the Union in any matter, and does not represent any of these 14 driver employees in any other matter. The Bush Gottlieb firm does separately represent the Union in the instant unfair labor practice charge upon which the General Counsel has issued complaint, and there are no other parties to the instant case.

4. I believe it was very clear to the Employer's counsel that the employees' individual releases of claims, including claims under the National Labor Relations Act, would have no effect on this case because the Union was not a party to any of these 14 individual driver settlements, none of the settlements did anything to address the unfair labor practice charges in the instant case, and the 14 individuals were not the Charging Party in the instant case before the NLRB.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 17th day of February, 2021, at La Crescenta, California.

Julie Gutman Dickinson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 801 North Brand Boulevard, Suite 950, Glendale, CA 91203-1260.

On February 17, 2021, I served true copies of the following document(s) described as **CHARGING PARTY'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

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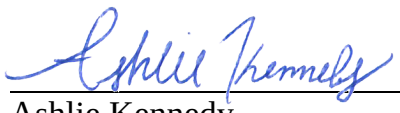
Executed on February 17, 2021, at West Covina, California.



Ashlie Kennedy